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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
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To: The Commission

REPLY COMMENTS OF
TAYLOR COMMUNICATIONS GROUP, INC.

TAYLOR COMMUNICATIONS GROUP, INC.

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SUMMARY

Taylor Communications Group, Inc. ("Taylor") is a Texas facilities-based Competitive Local Exchange Carrier (CLEC) located in Austin, Dallas/Ft. Worth, Houston and San Antonio. It offers local and long distance services for businesses in Texas, Extensive services are provided for Internet Service Providers and other information technology companies.

Like many commenters, Taylor believes that the Commission's goal of reforming legacy intercarrier compensation regulations and establishing a unified intercarrier compensation regime is laudable. Taylor also agrees with many commenters, however, that the Commission's proposal is unworkable at the present time, will not solve any of the "problems" is it designed to address, and that a properly configured CPNP ("Calling Party's Network Pays") regime would be a better solution.

Taylor strongly opposes the Commission's approaches of (1) completely abandoning its earlier approaches to this matter and basing intercarrier compensation upon bill and keep arrangements that are unworkable and anti-competitive, rather than upon concentrating upon improving the more efficient and rational cost-based methods used by the Commission in the past; and (2) taking a piecemeal approach by only dealing with a small part of intercarrier compensation (reciprocal Compensation), while not disturbing the vast majority of intercarrier compensation payments (access and wireless charges), in a manner that operates solely to the benefit of ILECs and which will put CLECs at a considerable competitive disadvantage. Taylor notes that even the author of the primary study relied on by the Commission as a rationale for its proposed action rejects the idea of a piecemeal approach.

Taylor agrees with commenters who support the Commission's earlier conclusion that "a minute is a minute," and urges the Commission to continue to drive all intercarrier compensation charges toward forward-looking economic costs.

The Commission proposes to move from a CPNP regime for intercarrier compensation to a piecemeal bill and keep model, implemented in different jurisdictions at different times and in different manners. Taylor believes that the Commission's approach largely ignores the areas in which reform is most needed, while concentrating on areas in which it is least needed. An inevitable result of this approach will be to tip the competitive scales even further in favor of incumbent LECs, at a point in time where the competitive LEC industry is already reeling. The clear impact of the Commission's approach (eliminating compensation payments from ILECs, while maintaining larger compensation payments to ILECs) is likely to be widely regarded as regulatory intervention in favor of poor ILEC business decisions, and is likely to discourage investors in competitive carriers.

The approach will also increase opportunities for regulatory arbitrage, as different compensation rules will apply to different traffic. Worse, the Commission's approach will not solve the problems it identifies, which can be easily solved with a more cost-based CPNP regime. The Commission's approach will require more regulatory intervention, not less, than a properly implemented CPNP regime. Finally, the approach to ISP-bound traffic will likely be viewed as yet another attempt to impose an "Internet access tax." (A tax in fact explicitly proposed by SBC.)

The Commission's approach is of questionable legality, at best, and flies in the face of the clear language of the Act. It will severely impact end user prices, raise prices for Internet access, create a host of difficult jurisdictional problems, and would be impossible to implement without an unprecedented (and unlikely) degree of cooperation from states, telecommunications carriers, and end users.

Taylor believes that bill and keep is clearly inferior to cost-based CPNP as a matter of economic theory, and that all of the real issues which the Commission proposes to address can be better dealt with by properly structuring forward-looking, cost-based pricing for transport and termination. This can, Taylor believes, be done more effectively, more efficiently, in a more competitively neutral fashion, and with less regulation under a properly structured CPNP regime.

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To: The Commission

REPLY COMMENTS OF TAYLOR COMMUNICATIONS GROUP, INC.

Taylor Communications Group, Inc. ("Taylor") is a Texas facilities-based Competitive Local Exchange Carrier (CLEC) located in Austin, Dallas/Ft. Worth, Houston and San Antonio. It offers local and long distance services for businesses in Texas. Extensive services are provided for Internet Service Providers and other information technology companies.

Taylor submits these Reply Comments in response to the ***Intercarrier Compensation*** *NPRM*.[1] For the reasons below, the Commission should not establish bill-and-keep as a mandatory form of intercarrier compensation for any traffic at this time.

I. INTRODUCTION

Taylor believes that bill and keep is clearly inferior to a cost-based CPNP ("Calling Party's Network Pays") regime as a matter of economic theory, and that all of the real issues which the Commission proposes to address can be better dealt with by properly structuring forward-looking, cost-based pricing for transport and termination. Unlike a bill and keep regime, a properly structured CPNP

[1] ***Developing a Unified Intercurrier Compensation Regime,*** Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132 (rel. April 27, 2001) ***("Intercarrier Compensation NPRM" or "NPRM").***

regime will result in an effective, efficient, and competitively neutral market.

Congress recognized the need for a single, unified intercarrier compensation regime when it directed just and reasonable reciprocal compensation arrangements for all telecommunications in **47** U.S.C. § 251(b)(5), and it recognized that cost-based intercarrier charges send appropriate economic signals in 47 U.S.C. § 251(d)(2). That approach has worked to increase competition, has lowered both reciprocal compensation charges and UNE charges, and has brought down access charges. The Commission should not now abandon cost-based pricing because of overblown concerns over "arbitrage." "Arbitrage" will occur for so long as prices do not match costs. The Commission's proposals will only lead to different "arbitrage" incentives.

SBC notes that the Commission should not be surprised that carriers have "followed the money"[2] in their competition. The Commission should also not be surprised that commenters have "followed the money" in their comments. Predictably, ILECs generally favor eliminating their own payments for reciprocal compensation while maintaining their receipts from access charges. Their competitors, for the most part, favor a system in which all carriers are fairly compensated for their costs of termination and transport.

11. APPROPRIATE GOALS FOR INTERCARFUER COMPENSATION RULES

A. Introduction

The Intercarrier Compensation NPRM starts with an inquiry as to what regulatory goals are appropriate for intercarrier compensation rules in competitive markets. It is not clear on what basis the Commission determines that it is dealing with "competitive markets," nor is any evidence cited by the

[2] Comments of SBC Communications Inc. at 10 ("SBC Comments").

Commission that the markets with which it deals in the NPRM are competitive.

The Commission begins by asking whether efficiency should be the sole or paramount goal for intercarrier compensation regulations.[3] In connection with this inquiry, the Commission asks whether it should consider the encouragement of the efficient use of the network by end-user customers, the efficient investment in and development of network infrastructure, and technological and competitive neutrality, in determining whether a particular intercarrier compensation regime encourages efficiency.[4]

The Commission also asks whether it should consider the degree of regulatory intervention required to implement interconnection regimes, whether a particular proposal would resolve the "difficult issues that characterize current intercarrier compensation regimes," whether a particular pricing proposal is likely to create new problems, and whether it is essential to adopt a single unified approach to intercarrier compensation.[5]

B. Appropriate Goals

1. Efficiency Is Not All

The most commenters appear to correctly reject the proposition that efficiency should be the Commission's sole or paramount goal for intercarrier compensation policy. While the Commission's list of other possible goals is laudable, the Commission curiously, **as** noted by many commenters, omits the crucial goal of regulatory certainty, so often relied on by the Commission in past proceedings, from its list.[6]

[3] *NPRM* at ¶ 33.

[4] *Id.*

[5] *Id.* at **¶¶ 33-36.**

[6] *Id.*, ***See*** Comments of Allegiance Telecom, Inc. at **6** ("Allegiance Comments"); Comments of Focal Communications Corporation, Pac-West Telecom, Inc., RCN Telecom Services, Inc. and US LEC Corp. at 1-4 ("Focal Comments"); Comments of the Office of Public Utility Counsel of Texas at 43, 50 ("OPUCT Comments").

The Commission also inexplicably omits the *statutory* goal of the promotion of competition (independent of its contribution to efficiency),[7] as well as the goals of legality,' consistency with just, reasonable, and affordable end user rates,' avoidance of rate shock," and fairness."

2. Regulatory Certainty and Fairness

It is axiomatic that investment occurs in environments where there is relative certainty, and that investment is discouraged by uncertainty. Both regulatory certainty and fairness are critical in today's uncertain telecommunications markets. In an atmosphere where a number of carriers have gone belly-up and investment dollars are hard to come by, the imposition of a totally new scheme for intercarrier compensation will continue, indeed cause more massive regulatory uncertainty, resulting in even more investor skittishness that translates into a reluctance to in new entrants.[12]

Worse, the *elimination* of intercarrier compensation payments flowing ***from*** ILECs, coupled with the *continuance* of much larger intercarrier compensation payments flowing *to* ILECs, sends an unmistakable (even if unintended) message to the financial markets – the Commission will act to protect incumbents from competition, and will protect them from bad business choices. Taylor agrees with

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[7] Allegiance Comments at 6; OPUCT Comments at 5**1;** Worldcom Comments at 4-6; 20. Other commenters, while not specifically noting the promotion of competition **as** a goal in reaction to the Commission's **inquiry,** clearly assume it to be a critical goal. ***See*** Comments of AT&T Corp. at 1-2 ("AT&T Comments"); Comments of AT&T Wireless at **6-14** ("AT&T Wireless Comments"); Comments of the Competitive Telecommunications Association at 2, 9-10, 16-21, 25-29 ("CompTel Comments"); Comments of the Florida Public Service Commission at 2-3 ("Florida Comments").

[8] OPUCT Comments at 51.

[9] ATA Comments at 4; OPUCT Comments at **5**1. See also comments on rate shock and fairness below, which can generally be assumed to be comments on just, reasonable, and affordable end user rates.

[10] Comments of the Regulatory Commission of Alaska at 2-3 ("Alaska Comments"); Comments of the People of the State of California and the California Public Utilities Commission at **3-4** ("California Comments"); Comments of CenturyTel, Inc. at 6-7 ("CenturyTel Comments"); Florida Comments at 3-4; Comments of Sprint Corporation at 24-25 ("Sprint Comments"). ***See** also* Focal Comments at 6.

[11] Alaska Comments at 2-3; California Comments at 3-4, **8;** Florida Comments at **3.**

[12] Allegiance Comments at 2, 9, 39-44. ***See** also* Worldcom Comments at 23-24.

commenters who make this observation.[13]

This message, unfortunately, becomes something in the nature of a self-fulfilling prophecy. Even if the Commission is not eager to discourage competition, it does so through the predictable reaction of investors, who will likely fail to provide the capital required for competition.

3. Costs of A New System

Taylor agrees with commenters who note that the significant costs of rearranging compensation and transport arrangements should be considered, especially in a case like the one at hand, where carriers have spent literally years negotiating, arbitrating, and litigating interconnection agreements and will be forced, by the massive regulatory shift contemplated by the Commission, to start all over again. This will significantly harm competitive carriers.[14]

Taylor also agrees with commenters who note that the Commission should consider the massive costs of network re-optimization, redesign, and rebuild that will be required for carriers to adjust to a sudden reversal of the Commission's regulatory approach." The Commission should be well aware that the impact of this is far from competitively neutral, and is in fact anti-competitive, as it falls primarily on networks being designed and built by new entrants, rather than upon ILECs with their ubiquitous legacy networks.[16]

4. Degree of Regulatory Intervention Required

The Commission seeks comment on the extent to which particular proposals require regulatory

[13] Allegiance Comments at 2, 5, 9; 16; 40; Focal Comments at 19-21; OPUCT Comments at 43-45. *See also* AT&T Comments at 47.

[14] Allegiance Comments at **9;** Worldcom Comments at **8**. ***See** also* Worldcom Comments at 23-24.

[15] Worldcom Comments at 9.

[16] *See* AT&T Comments **at** 59-60; Focal Comments at 18; Comments of Global Crossing Ltd. At **4-7** (Global Crossing Comments"); Worldcom Comments at 22.

intervention.[17] The *NPRM* leaves the impression that the Commission believes that its proposed bill and keep regime will lessen the need for regulatory intervention.[18] This is, unfortunately, not the case. Taylor agrees with commenters who conclude that under bill and keep, regulators would focus less on intercarrier charges, at the expense of focusing *more* on end user charges. Unless the Commission is willing to simply abandon end users to the tender mercies of ILECs with substantial market power over consumers, it will be forced to develop and implement a regulatory system to control end user charges."

Taylor agrees with commenters who note that this expanded regulatory system will be impossible to implement without an unprecedented (and unlikely) degree of cooperation from states, telecommunications carriers, and end users. There will have to be mechanisms to ensure that state regulators follow the Commission's new model, or the Commission will merely open vast new vistas to true regulatory arbitrage, as the issue of who pays for what becomes entirely dependent on what regulatory regime a call falls under.[20]

Taylor agrees with states and carriers who note that additional regulation will be required to ensure that carriers reduce their rates to the extent they shift costs to end-users and away from carriers, to avoid the massive windfall profits that would otherwise occur." Taylor further notes that even ILECs admit that end user recovery mechanisms will need to be addressed,[22] since they propose a lengthy regulatory process to eliminate implicit subsidies in access charges prior to implementing bill and

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[17] *NPRM* at ¶ 34.

[18] *Id.*

[19] AT&T Comments at 26-29.

[20] Allegiance Comments at 23-25; Worldcom Comments at 17.

[21] Alaska Comments at 8; Allegiance Comments at 13-18, 44-52; Focal Comments at 5-11.

[22] Comments of SBC Communications, Inc. at 2, 24 ("SBC Comments").

keep.[23]

In addition, the bill and keep system proposed by the Commission will not even obviate the need for regulation of intercarrier charges and practices. The COBAK proposal would eliminate intercarrier charges only for some elements (loop, local switching, and originating transport), leaving terminating transport and trunk charges in need of regulation to forestall the abuse of market power.[24] As COBAK's author admits, ILECs could still manipulate rate structures under COBAK, so regulation will be needed to stop them.[25]

Taylor also agrees with commenters who note that the Commission will need to regulate IXC interconnection quality closely in a bill and keep regime.[26]

III. BILL-AND-KEEP ARRANGEMENTS

Before addressing the Commission's questions regarding bill and keep, it is necessary to address the premature nature of the Commission's inquiry. Taylor agrees with other commenters that the Commission should issue a more detailed bill and keep proposal if it is inclined to continue with an examination of bill and keep.[27] The current proposal too rushed and is lacking in too many details for its total implications to be examined properly.

A. Policy Justifications for Bill-and-Keep

The Commission proposes to move from a CPNP regime for intercarrier compensation to a bill

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[23] BellSouth Comments at 15, 28; SBC Comments at 20-24; Sprint Comments at 20, 23-24.

[24] AT&T Comments at 28-29.

[25] *DeGraba* 2001 at 19-24; Initial Comments of the Illinois Commerce Commission at 8-9 ("Illinois Comments"); Worldcom Comments at 26.

[26] AT&T Comments at 31-32, 48-49; Worldcom Comments at 25.

[27] Florida Comments at 1; Illinois Comments at 5-8; Comments of the Public Service Commission of the State of Missouri

and keep model. It bases this move in large part upon two assumptions: (1) that there has been market-distorting "regulatory arbitrage" in the business of serving ISP end users; and (2) that the called party, as well as the calling party, benefits from a call, and should therefore pay for a part of the call.

1. "Regulatory Arbitrage"

The first difficulty with the Commission's "regulatory arbitrage" argument is that the business of serving ISP end users is not an example of regulatory arbitrage, but rather of successful competition by CLECs for a group of customers whom the ILECs are not eager to serve and are, in general, in competition with. Taylor agrees with commenters who note that the outcry that the Commission perceives on this issue is solely that of ILECs who, having initially demanded high reciprocal compensation prices on the theory that compensation would flow in their direction, are now opposed to it in the limited instance in which compensation flows may be in the other direction.[28]

The second difficulty is that the Commission has historically *encouraged* competition of the type it here refers to as "regulatory arbitrage" to bring rates into line with competitive pricing patterns, for instance in the areas of WATS resale, the ESP exemption, the resale of international private lines, and in the area of international settlement rates.[29] It worked in those cases, and it has worked in the cases of reciprocal compensation and (through the linkage of rates) UNE rates, to bring down prices to more realistic levels.[30]

The third difficulty is that bill and keep will not solve the problems perceived by the Commission, which could more easily be solved by a more thorough application of cost-based CPNP

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at 3-4; Initial Comments of the National Association of Regulatory Utility Commissioners.

[28] Allegiance Comments at 1, 13-16; OPUCT Comments at 25-37.

[29] Allegiance Comments at 7, 10-13; AT&T Comments at 17; CompTel Comments at 6-8; Worldcom Comments at 18.

principles, including the updating of inflated reciprocal compensation and access rates to consistently reflect forward-looking costs and to remove implicit subsidies. Taylor agrees with commenters who come to this conclusion.[31]

The Commission relies heavily on the BASICS[32] and COBAK[33] studies for support for the proposition that bill and keep arrangements reduce "regulatory arbitrage," reduce the terminating access monopoly problem, lead to more efficient retail rates and thus more efficient network usage,[34] and, in fact, to more balanced traffic.[35] These are, as noted by at least one commenter, merely theoretical constructs untested by actual market events.[36]

The Commission appears to be largely motivated by one narrow issue: ILEC payments to CLECs for termination of ISP-bound traffic.[37] Taylor agrees with commenters who note that the flow of reciprocal compensation from ILECs to CLECs for the termination of traffic to customers with unbalanced traffic (including ISPs) is not a result of "regulatory arbitrage." It is, instead, a result of competition by CLECs for customers whose needs were not being met by ILECs (and with whom, in many cases, ILEC subsidiaries were in competition), coupled with a conscious decision by ILECs not

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[30] ***See*** Allegiance Comments at 10-13; CompTel Comments at 6-8.

[31] AT&T Comments at 13-20.

[32] Jay M. Atkinson & Christopher C. Bamekov, ***A Competitively Neutral Approach*** *to* ***Network Interconnection*** (Federal Communications Commission, OPP Worlung Paper No. 34, Dec. 2000) **("*Atkinson-Barnekov*")**.

[33] Patrick DeGraba, *Bill* ***and Keep at the Central*** *Office* ***as the*** *Efficient* ***Interconnection Regime*** (Federal Communications Commission, OPP Working Paper No. ***33,*** Dec. ***2000)*** ("*DeGraba* 2000").

[34] *NPRM* at ¶¶ 22-30.

[35] ***See*** AT&T Wireless Comments at **14**-15.

[36] Comments of ALLTEL Communications, Inc. at 13 ("ALLTEL Comments").

[37] *NPRM* at ¶¶ 2, 24, *65*

to compete for those customers.[38]

Implicit in the NPRM, the COBAK study, and the BASICS study, is the assumption that traffic flow imbalance is bad, and that any intercarrier compensation structure that results in imbalanced, or "convergent," traffic flow is flawed. Taylor agrees with commenters who remark that this premise is unsupported by evidence, untested, and most likely untrue.[39] The assumption that traffic would be balanced might well have been correct prior to the introduction of competition in the local service market, when service was provided by non-geographically overlapping ILECs, but it is unlikely today.[40] Indeed, Taylor agrees with commenters who conclude that since new entrants and CLECs in general will have a smaller customer base than ILECs, it is more likely that their traffic will be unbalanced, since customer traffic is unlikely to be balanced and individual customers will have larger effect on a CLECs overall traffic balance. They are not going to be successful operating as scaled-down ILECs[41]

As one commenter notes, traffic imbalance may be a ***good*** sign – as IXCs and end users move to dedicated access to avoid the admittedly bloated switched access charges (a good thing, encouraged by the Commission, and exactly the kind of efficiency gain that increased competition should produce), resulting in an imbalance between originating and terminating minutes.[42] IXC/LEC traffic exchanges are inherently unbalanced.[43]

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[38] Focal Comments at 19-21; OPUCT Comments at 26-31.

[39] Comments of the Ad Hoc Telecommunications Users Committee at 6-7 ("'Ad Hoc Comments").

[40] Ad Hoc Comments at 6-8.

[41] Focal Comments at 12-14.

[42] Ad Hoc Comments at 7-8. See also SBC Comments at 7.

[43] California Comments at 6-7.

2. "Called Party Benefits"

The *NPRM* concedes that "[m]odern economic analysis" uniformly treats the calling party as the cost causer, but then questions this assumption based solely on the anecdotal observation that called parties can benefit from calls.[44]

Taylor agrees with commenters who note that the assumption that calling and called parties benefit from calls is both unproven (and likely untrue)[45] and does not address the central economic issue – who ***causes*** the costs.[46] Indeed, as the Commission concedes, "regulators cannot know how benefits are distributed between the parties."[47] Taylor agrees with commenters who note that it is the ***culling*** party who makes the decision to call and initiates a call. The calling party, therefore, is the cost causer, and should be economically responsible for its costs.[48] The current CPNP regime handles this transaction in an economically efficient manner, while bill and keep regimes put part **of** the cost on the wrong party.

3. Avoidance of Allocation of Common Costs

The Commission asks if bill and keep can avoid the problem of the allocation of common costs.[49] Taylor agrees with commenters who conclude that it does not.[50]

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[44] *NPRM* at ¶¶ 19, 37.

[45] ***See*** Ad Hoc Comments at 7; CompTel Comments at 10-16; OPUCT Comments at 23-24.

[46] The two are, in fact, entirely separate and distinct. **As** one commenter notes, a homeowner's landscaping may benefit others, like other homeowners on the same street and passersby, yet the homeowner is the cost causer and pays for improvements. OPUCT Comments at 57.

[47] *NPRM* at ¶ **39.**

[48] AT&T Comments at 22; CompTel Comments at 13-14.

[49] NPRM at ¶ 39.

[50] Alaska Comments at **4-6;** California Comments at 3-4, 9; CenturyTel Comments at 19-20; Florida Comments at 4-5; Focal Comments at 6-10.

4. Computer II as a Precedent

The Commission suggests that bill and keep proposals may be seen as following the precedent of the Computer II decision." Taylor agrees with commenters who point out that the analogy to CPE and the Computer II decision is inapposite, as neither has anything to do with the termination or origination of traffic. (NEED CITE)

B. Efficiencies of Bill-and-Keep Arrangements

1. Termination Costs

The Commission appears to suggest that the peering arrangements of large Internet backbone providers somehow justify a move toward bill and keep. Peering arrangements between large Internet backbone providers are simply not relevant to the cost issues at hand. Taylor agrees with commenters who make this point. They correctly argue that intercarrier compensation for terminating traffic involves mostly traffic-sensitive costs, while Internet backbone peering providers provide capacity-based packet switched, and thus not traffic-sensitive costs.[52] They note that Internet backbone providers do not have market power, as do ILECs – thus, their arrangements are not exactly a useful model for arrangements between ILECs and other carriers.[53] Taylor also agrees with commenters who point out that even were the peering arrangements between Internet backbone providers relevant, they are not on a universal bill and keep basis, which the Commission seems to assume. Bill and keep arrangements in the Internet backbone area are generally only for some players. Others have to pay.[54]

[51] *NPRM* at ¶ 41.

[52] ***See*** Comments of Cable & Wireless **USA** at 22-25; ("Cable & Wireless Comments"); OPUCT Comments at 22.

[53] Comments of Cable & Wireless **USA** at 22; Worldcom Comments at 5.

[54] Cable & Wireless Comments at 22-25; OPUCT Comments at 22.

The Commission asks for comment on possible reasons or rationales why bill and keep arrangements may be efficient. Taylor agrees with commenters who maintain that COBAK and BASICS are flawed, contradict each other, and ignore the relationship between intercarrier compensation schemes and retail rates."

2. Transport Costs

As noted below, Taylor agrees with commenters who conclude that even the author of the COBAK study admits that his transport rule is inefficient. Taylor agrees with the Commission on this point as well.[56] Taylor further agrees, as noted below, with commenters who conclude that neither the COBAK nor BASICS proposals offer good solutions to transport cost issues.

3. Transaction Costs

The Commission asks for comment on the sizes of transaction costs for the CPNP and COBAK models, concentrating on measuring and billing." Taylor disagrees with commenters who address only these costs, since they are not the only (or even the primary) transaction costs to which the Commission should look. The Commission relies extensively on the idea that call benefit is the same as cost causation, but ignores the simple fact that the decision to make a call or not make a call depends upon the calling party. It proposes to substitute for that relatively simple decision a system in which costs will be supposedly be controlled by the actions of end-user customers in making the much more painful and cost-ridden decision of which local access provider they use. The Commission explicitly relies on this decision to create the efficiencies it claims for bill and keep, and must address the very high

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[55] Allegiance Comments at 18-21

[56] *NPRM* at ¶ 47.

[57] *NPRM* at ¶ 51.

transaction costs to the individual end-user customer inherent in this assumption.

Taylor also notes that even ILECs recognize the increased administrative costs that would be caused by a piecemeal implementation of bill and keep of the sort that the Commission proposes.[58]

C. Bill and Keep as a Solution to Existing Interconnection Issues

The Commission asks for comment on whether bill and keep will resolve existing interconnection problems, including "regulatory arbitrage," terminating monopolies, subscription decisions, and the allocation of transport costs.[59]

The reality is that bill and keep, on its own, will not resolve any of these issues. In fact, ***none*** of the issues identified in the NPRM turns on whether the rule of intercarrier compensation is bill and keep or CPNP. Taylor agrees with commenters who conclude that these issues are attributable to the failure to require forward-looking, economic cost-based prices,[60] and can be more adequately be resolved through adjustment of the current CPNP regime.[61]

1. "Regulatory Arbitrage"

The Commission identifies two aspects of what it labels "regulatory arbitrage": first, that rates for reciprocal compensation may be "inefficiently structured or set too high" in ways that create inefficient incentives for new entrants to target customers with predominantly terminating traffic;[62] and second, that the ESP exemption gives providers of IP telephony an "artificial cost advantage" over

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[58] Sprint Comments at 23-24.

[59] *NPRM* at ¶¶ 52-57.

[60] Declaration of Janusz **A.** Ordover **and** Robert D. Willing on Behalf of AT&T Corp. at ¶ ***6 ("Ordover-Willing").***

[61] ***See*** AT&T Comments at 13-20.

[62] *NPRM* at ¶ 11.

interexchange carriers.[63] The Commission ignores the problem of rates set *too* ***low*** (at zero, for instance, under bill and keep) – a problem which, Taylor submits, is as likely to cause "regulatory arbitrage" as rates set too low – and one which is impossible to compensate for in a bill and keep regime, while "high" rates can be dealt with in a CPNP regime by making prices cost-based and symmetrical.

There are numerous difficulties with "regulatory arbitrage" as a justification for switching to bill and keep regime. First, as discussed above, it is not clear that it is, in fact, a problem. The Commission itself provides no evidence for this proposition, and other commenters agree that it is not the case.[64] Second, as several commenters note, *neither of these "problems" has anything to* ***do*** *with the system of intercarrier compensation* ***used,*** and both can be solved by ensuring that charges for all origination and termination are set on the basis of forward-looking economic costs.[65] Third, the Commission has expressly found that there are no inherent cost differences in terminating traffic to ISPs as compared to other end users, and thus no reason to single out ISP-bound traffic for special treatment.[66] The same compensation system should work for both. Finally, to the extent that some commenters argue that reciprocal compensation rates are "too high," the Commission should remember that the level of those rates is due primarily to pressures exerted and costs supported *by those commenters*, and that the fact that those rates have fallen is due in large part to the past actions of this Commission in making those rates symmetrical and linking them to prices for network elements. Those actions are achieving the desired effects in terms of efficiency and competition, and should not now be abandoned.

Taylor also agrees that any "cost advantage" of ESP providers is not due to the use of CPNP

[63] *NPRM* at ¶ 12.

[64] AT&T Comments at 15; **(USE 22** ABOVE **– ISP)**

[65] AT&T Comments at 14.

regime, but rather to the Commission's decisions to set access charges above cost, followed by its decision, realizing the bloated nature of those charges, to protect a nascent ESP industry from them through exemption, as recognized by both the COBAK study[67] and commenters.[68] Any difficulty here (if, in fact, one exists) is not due to the use of CPNP as a compensation regime, and will not be resolved by a switch to bill and keep.

Not only is bill and keep not a solution to the "regulatory arbitrage" problem the Commission perceives, it will foster real regulatory arbitrage and monopoly abuse. Taylor agrees with commenters who conclude that trading CPNP for bill and keep simply trades one form of arbitrage incentives for another, because bill and keep breaks the linkage between end-user prices and costs by requiring the called party to subsidize the costs of calls made by another party.[69] It will distort carriers' incentives and encourage them to seek out customers that primarily originate traffic – as the Commission explicitly found in the Local *Competition Order*.[70] Worse, the piecemeal implementation proposed by the Commission will guarantee arbitrage, as commenters (even ILECs) note.[71]

2. Terminating Access Monopolies

The Commission is rightly concerned over the abuse of terminating access monopolies." However, these monopoly abuses can be addressed in a CPNP regime through establishing cost-based

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[66] *ISP* ***Remand Order*** at ¶ 90.

[67] *DeGraba 2000* at ¶ 78.

[68] AT&T Comments at **16.**

[69] AT&T Comments at 30.

[70] ***Local Competition Order*** at ¶ 1112.

[71] Comments of Allied Personal Communications Industry Association of California at 10 ("Allied Comments"); CenturyTel Comments at 29-30; **SBC** Comments at 25; Worldcom Comments at **17-18.**

[72] *NPRM* at ¶¶ 13-15.

rates for terminating access services. At least with respect to ILECs, bill and keep will not eliminate market power. Terminating monopolies will still exist, and abuses will still be possible - ***independent of compensation regime*** - because market power will still exist, as the Commission recognizes.[73] Absent a new program of stringent regulation of end-user access charges, bill and keep will change nothing. Taylor agrees with commenters who conclude that bill and keep will not resolve this issue.[74]

Taylor further agrees with commenters who note the past abusive behavior of ILECs in bill and keep environments (for example, with regard to paging and CMRS carriers), where ILECs consistently attempted to maximize the interconnection costs of connecting carriers, to their competitive disadvantage.[75] Taylor sees no reason to believe that these abuses would disappear in a new bill and keep regime.

3. Regulation of End User and Termination Rates

The Commission asks for comments on how a move to COBAK would impact end user rates and termination rates and their regulation, as well as the need for regulation of interconnection terms.[76] As noted elsewhere, Taylor agrees with commenters who conclude that the impacts will be high and that the Commission will need engage in ***additional*** regulation in each of these areas.

D. Disadvantages of Bill-and-Keep Arrangements

As noted elsewhere, the COBAK proposal does not really define a concept central to its execution – the definition of the "Central Office" in "Central Office Bill And Keep". Taylor agrees

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[73] See, e.g., ***In The Matter of Access Charge Reform***, Seventh **Report** and **Order,** FCC **01-146,** ¶¶ 30-31 **(Apr.** 27, 2001) **("*CLEC Access Charge Order");Access*** *Reform NPRM* at ¶ 279.

[74] AT&T Comments at 17, 26-29; ***Ordover- Willig*** at ¶¶ 20, 54.

[75] Allied Comments at 11-13.

[76] NPRM at ¶¶ 55-57.

with commenters who advise the Commission to issue a more detailed proposal on this matter.[77]

The Commission seeks comment on whether under a bill and keep regime, unwanted calls are likely to be a significant problem. Taylor agrees with commenters who maintain that they will.[78]

The Commission asks whether, under bill and keep, it will be necessary to regulate the transport rates charged by ILECs, as the author of COBAK admits.[79] Taylor agrees with commenters who conclude that additional regulation would be required in this area.”

2. Increase in ISP Rates

The Commission asks whether a shift to bill and keep for ISP-bound traffic will cause carriers to raise the rates they charge ISPs, resulting in higher Internet access prices.“ The answer to this question is an unequivocal yes. **As** carriers are denied compensation for the termination of calls, they will be forced to increase end user rates. Taylor agrees with commenters who conclude that there can be no question that customers with large ratios of terminating to originating traffic will bear the brunt of these increases, and there can be no question that ISPs will have to pass these increases along. In addition, bill and keep will put increasing pressure on LECs to charge **ISPs** usage-sensitive rates, which would in turn put pressure on them to charge their end users usage-sensitive rates.[82]

Worse, the accomplishment of these increases by the Commission's regulatory action will, in all likelihood, be perceived as an "Internet access tax," with all of the difficulties inherent in this

[77] Illinois Comments at 7.

[78] AT&T Comments at ***5;*** CompTel Comments at 4.

[79] NPRM at ¶ 61.

[80] Focal Comments at 11; Illinois Comments at **9.**

[81] *NPRM* at ¶ 64.

[82] AT&T Comments at **33;** Focal Comments at 15-16.

perception. Such a tax (or worse, a "Cable and Internet Tax") is, in fact, ***explicitly*** proposed by SBC as a percentage-based surcharge on cable modem service and Internet services.[83]

E. Bill and Keep for ISP-Bound Traffic

1. The *ISP Remand Order*

The Commission proposes, as a result of its conclusion in the ***ISP Remand Order*** that ISP-bound traffic is exempted from the reciprocal compensation obligation under Section 251(g),[84] to mandate bill and keep for all ISP-bound traffic. This logic followed in the ***ISP Remand Order,*** note several commenters, is fraught with peril, and is unlikely to be upheld on review.

Taylor agrees with commenters who conclude that the Commission's repeated attempts to carve out ISP-bound traffic for different treatment than other traffic subject to reciprocal compensation, most lately resulting in the ***ISP Remand Order,*** are contrary to the plain language of the Act and inconsistent with the history of the Act and the Commission's prior interpretations of the Act, and should be abandoned.[85] Taylor will not repeat those arguments here.

Taylor also agrees with comments that the Commission, whether intentionally or not, has already expressly exempted ISP-bound traffic from access charges under the rationale it used to exempt them from reciprocal compensation in the ***ISP Remand Order***.[86]

2. Different Treatment of ISP-Bound Traffic

The Commission seeks comment on the implications of mandating bill and keep for ISP-bound

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[83] SBC Comments at *23.*

[84] ***Intercarrier Compensation for ISP-Bound Traffic,*** CC Docket *Nos.* 96-98, 99-68, Order on Remand and Report and Order, FCC 01-132, ¶ 78, n. 149 (Rel. April 27, 2001)(petition for stay pending) ("***ISP Remand Order"***)

[85] AT&T Comments at 42-46; Focal Comments at 33-37.

[86] Allegiance Comments at 53-54; Focal Comments at 33-37.

traffic in the absence of a unified bill and keep regime for other traffic.[87] The Commission has expressly found, after years of hotly contested proceedings on the matter, that there are no inherent cost differences in terminating traffic to ISPs as compared to other end users, and thus no reason to single out ISP-bound traffic for special treatment.[88] There is, therefore, no economic justification for subjecting "voice" and "data" traffic to different rules.[89] Taylor agrees with commenters who come to this conclusion.[90]

3. UNE Rates

The Commission seeks comment on its reasoning that a bill and keep approach to compensation for ISP-bound traffic will not compromise the ability of state commissions to rely on cost studies submitted over the last 12-24 months in support of lower rates for reciprocal compensation and UNEs. Taylor believes that this question is too limited, and should be asked in relationship to *all* reciprocal compensation arrangements, not just those for ISP-bound traffic.

Taylor agrees with the many commenters who note that bill and keep will harm local competition by removing the only incentive ILECs have to cooperate in setting cost-based UNE rates." This cooperation is critical, as getting at costs can be made more or less difficult depending on the cooperation of the carriers involved. Today, state commissions typically borrow UNE switching rates when determining appropriate rates for reciprocal competition. This linkage provides ILECs with at least some incentive to seek reasonable, cost-based UNE switching rates in an effort to lower their own

[87] *NPRM* at ¶ **66.**

[88] *ISP* ***Remand Order*** at ¶ 90.

[89] Quotation marks are intended to indicate that the distinction between the two is not at all clear in the current environment.

[90] Allegiance Comments at 39-44.

[91] AT&T Comments at 32.

reciprocal compensation rates. This linkage has contributed to the reduction of reciprocal compensation rates noted by the Commission in the *ISP* ***Remand Order.*** With a bill and keep regime, however, the linkage will disappear, incentives to set realistic cost-based UNE rates will disappear, and the job faced by regulators in fairly setting these rates will become more onerous, if not impossible.

F. Bill and Keep for Traffic Subject to Section 251(b)(5)

1. Relative Benefits of CPNP and Bill and Keep

The Commission asks for comment on the relative benefits of bill and keep and the existing per-minute reciprocal compensation rates imposed by most states for traffic subject to Section 251(b)(5).[92] While the Commission's specific questions on the relative merits of both systems are answered elsewhere, Taylor reiterates that it agrees with commenters who see no benefit in a switch to a mandatory bill and keep regime and who believe it has fewer benefits, and more drawbacks, than the current system. Taylor also agrees with commenters who conclude that the Commission's proposed switch to bill and keep will be anti-competitive in the extreme.

2. Transport Responsibilities and Costs

The Commission seeks comment on the best way to allocate transport responsibilities and costs under a mandatory bill and keep regime.[93] Taylor agrees, as stated elsewhere, with commenters who conclude that the current rules on transport responsibilities and costs are preferable to any allocation that might occur under a bill and keep regime. Taylor further agrees with commenters who suggest that a bill and keep rule will create perverse incentives as to the location of POIs.[94]

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[92] *NPRM* at ¶ 69.

[93] *NPRM* at ¶ 70.

[94] AT&T Comments at 49-51.

3. Three-Carrier Calls

The Commission seeks comment on how a bill and keep regime would affect three-carrier calls.[95] Taylor agrees with commenters who note that the current transit system is efficient, is incompatible with a bill and keep regime, and that a bill and keep system for transiting traffic would be inefficient and anticompetitive.[96]

4. Transport Responsibilities and Costs

The Commission seeks comment on whether the current single POI and transport rules should apply in a bill and keep regime.[97] Taylor agrees, as stated elsewhere, with commenters who conclude that the current rules are preferable to any that might operate under a bill and keep regime.

5. Legal Authority

The legal authority advanced by the Commission and by some commenters for the proposition that the Commission has the ability to mandate bill and keep for intercarrier compensation is not supportable. Taylor agrees with commenters who determine that a mandatory bill and keep rule for reciprocal compensation is prohibited by the Act.[98]

a. The Act

The Act is clear on its face. Section 251(b)(5) requires an ILEC to "establish reciprocal

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[95] *NPRM* at ¶ 71.

[96] See AT&T Comments at 62-63; Sprint Comments at 33-35.

[97] *NPRM* at ¶ 72.

[98] Allegiance Comments at 35-38; AT&T Comments at 36-39; CenturyTel Comments at 25-26; CompTel Comments at 22-25; Focal Comments at 28-33; OPUCT Comments at 47-48; Comments of the National Association of State Utility Consumer Advocates at 27-28; Worldcom Comments at 18-20. Some commenters, like Time Warner Telecom, go only so far as to say the proposal "raises serious legal issues," but the issues they point out cannot be overcome. Comments of Time Warner Telecom at 27-29.

compensation requirements for the transport and termination of telecommunications."[99] Section 252(d)(2)(A)(i) requires that this compensation must provide for the "*mutualand reciprocal recovery by each carrier* of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[100] Section 252(d)(2)(A)(ii) requires that this compensation must be a "reasonable approximation of the additional *costs of terminating* such calls."[101] Section 252(d)(2)(B)(i) provides that this language shall not be construed "to preclude arrangements that afford the mutual recovery of costs *through the offsetting of reciprocal obligations,* including arrangements that waive mutual recovery (such as bill-and-keep)."[102]

The plain meaning of this language is clear. As between two carriers, compensation requirements must allow carriers to be compensated *by each other* (mutually and reciprocally) for their costs of transporting and terminating each other's traffic. Costs may be recovered through the offset of obligations. The intent of Congress is clear (despite ILEC arguments to the contrary) and "that **is** the end of the matter."[103]

And costs there are. The Commission has consistently found that carriers incur costs in terminating that are not *de minimis*.[104]

b. Commission Argument – Section 252(d)(2)

With regard to other traffic, the Commission now appears to be eager to depart from its long-

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[99] 47 U.S.C. § 251(b)(5).

[100] 47 U.S.C. § 252(d)(2)(A)(i).

[101] 47 U.S.C. § 252(d)(2)(A)(ii) (emphasis added).

[102] 47 U.S.C. § 252(d)(2)(B)(i) (Emphasis added).

[103] Good *Samaritan Hosp. v. Shalala*, 402,409 (1993), quoting *Chevron, U.S.A.,* Inc. *v. Natural Res. Def. Council, Inc.*, **467** U.S. 837,842 (1984).

[104] *Local Competition* Order at ¶ 1112.

standing conclusion in the ***Local Competition*** *Order*[105] (a conclusion urged on it by ILECs at the time,[106] and now abandoned by them once CLECs competed successfully for some business) that the Commission and states lack the authority to mandate bill and keep arrangements under any circumstances, and can impose bill and keep arrangements only when traffic is in balance and symmetrical rates are applied.[107]

The Commission now argues that bill and keep arrangements provide for the "mutual and reciprocal recovery of costs associated with the transport and termination of traffic" when traffic is not in balance, because a bill and keep arrangement affords "the mutual recovery of costs through the offsetting of reciprocal obligations," since one party terminates the other's calls, and vice versa, thus providing for "in-kind" reciprocal compensation.[108] The Commission further posits that the opportunity to recover costs from end users can "afford the mutual recovery of costs."[109] The Commission asks for comment on whether bill and keep can that "afford the mutual recovery of costs through the offsetting of reciprocal obligations" when traffic is not in balance, or whether the term "offsetting" implies that traffic must be balanced."' Finally, the Commission asks whether the prohibition on forbearance from

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[105] ***Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,*** First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499 (1996) ("Local Competition Order"), ***aff'd in part and vacated in part*** *sub* ***nom. Competitive Telecommunications Ass'n v. FCC,*** 117 F.3d 1068 (8th Cir. 1997), ***aff'd in part and vacated in part sub nom. Iowa*** *Utils.* ***Bd.*** *v.* ***FCC,*** 120 F.3d 753 (8th Cir. 1997), ***aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa*** *Utils.* ***Bd., 525*** U.S. 366, 119 S.Ct. 721 (1999).

[106] ***See*** BellSouth Local Competition Comments in CC Docket No. 96-98 at 73-75; GTE Local Competition Comments in CC Docket No. 96-98 at 56-59; SBC Local Competition Comments in CC Docket No. 96-98 at 51-53. These carriers make no mention of their original petition in their current comments in **this** proceeding.

[107] *Local* ***Competition Order*** at ¶ 1111-1112.

[108] NPRM at ¶ 75.

[109] NPRM at ¶ 76.

[110] *NPRM* at ¶ 77.

Section 271, a section which references Section 252(d)(2), prohibits the imposition of bill and keep."[111] It asks for comments on these arguments.

The difficulty with the Commission's new arguments is that they ignore the plain language of the statute and the Commission's consistent past interpretation of the law. First, the Commission has consistently (and correctly) concluded that since costs of termination are not ***de*** minimis, bill and keep does not afford recovery of the terminating carrier's costs when traffic is out of balance.[112] The Commission has found, over a period of some 28 years now, that switching costs are traffic-sensitive.[113] In other words, there are always costs of termination (unless the Commission can, for some reason, reverse itself).[114] The statute requires the recovery of those costs. Arrangements that lack any provisions for compensation (like bill and keep) do not allow the recovery of costs.

Second, the words "mutual ***and*** reciprocal recovery" and "mutual recovery" simply do not extend to the recovery of costs from third parties such as end users. To argue otherwise, as the Commission now does, is simply casuistry.

Third, the recovery of costs from third parties is not "the mutual recovery of costs through the offsetting of reciprocal obligations," because any obligations between carriers and their end users are not reciprocal between the carriers, nor are their recovery mutual when it is a recovery from a third party.

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[111] *NPRM* at ¶ 78.

[112] ***Local Competition Order*** at ¶ 1112.

[113] Since at least ***MTS and WATS Market Structure,*** CC Docket No 78-72, **Phase** I, **Third** Report and Order, 93 F.C.C> 2d 241, ¶ 27 (1983). ***See*** Allegiance Comments at **46-48.**

[114] **As** Worldcom notes, the Commission ***could*** mandate bill and keep for out-of-balance traffic ***if itfound that the costs of termination, primarily switching costs, are completely usage-insensitive.*** This would, of course, have interesting implications on the pricing of switching **as** an unbundled element, which would then need **to** be switched **to** a flat-rated basis. Worldcom Comments at 19.

Finally, the Commission is well aware that it is not entitled to much deference from the courts in construing statutory language that appears clear on its face. The Commission should be aware that the extent to which it must resort to extraordinary contortions in order to reach a construction of language favorable to its bill and keep proposals is likely to be a factor in a finding that the Commission has not followed the clear meaning of the statute.

C. Commission Argument - Forbearance

The Commission suggests that it could impose a mandatory and across-the-board bill and keep regime, notwithstanding the requirements of Section 252(d)(2), by forbearing from those requirements under 47 U.S.C. § 160.[115] Taylor agrees with commenters who conclude that the statutory forbearance criteria have not been satisfied.[116]

In addition, Taylor agrees with commenters who conclude that the Commission is precluded by the interplay of Sections 160 and 271 from forbearing, Section 260 provides that the Commission may not forbear from applying the requirements of Section 271 until it determines that those requirements have been fully implemented.[117] Section 271, in turn, states that its requirements can only be fully implemented if the interconnection arrangements provided by incumbent LECs include reciprocal compensation arrangements in accordance with the requirements of Section 252(d).[118] In other words, there is no way for the Commission for forbear from applying the requirements of Section 252(d), because in order to do so, it must determine that those requirements have been met.

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[115] *NPRM* at ¶ 77.

[116] AT&T Comments at 39-41.

[117] 47 U.S.C. § 160(d).

[118] 47 U.S.C. § 271(c)(2(B)(iii).

d. ILEC Arguments

ILEC comments, favoring the imposition of mandatory bill and keep, are notable for the paucity of their legal reasoning and their lack of any real contribution to the arguments already advanced by the Commission.

BellSouth argues that Section 251(a) of the Act imposes a general duty to interconnect with other carriers, without regard to the jurisdictional nature of the service or carrier involved, and thus necessarily encompasses both reciprocal compensation and access charges. Since the Commission's general rulemaking authority extends to the implementation of Section 251, argues BellSouth, the Commission has the legal authority to establish bill and keep arrangements for reciprocal compensation. In addition, says BellSouth, "[a]s long as mutual compensation of carrier costs is predicated on each carrier recovering its own costs of transport and termination from end-user customers, the Commission need not condition the implementation of bill-and-keep on the existence of balanced traffic." No legal authority is offered for either proposition.[119]

BellSouth also argues that there is no requirement in the statute or its legislative history that bill and keep as a form of reciprocal compensation is limited to situations where traffic is in balance, and no limit on the scope of any particular bill and keep regime than that any intercarrier compensation mechanism established by the Commission provide for the mutual recovery of costs. BellSouth argues that this can be done through recovery from end users.[120]

The difficulty with the BellSouth position is that is it ignores the plain language of the statute. While admitting that Section 251(b)(5) requires the establishment of reciprocal compensation

[119] Comments of BellSouth at **17-18** ("BellSouth Comments").

[120] BellSouth Comments at 20-21.

arrangements, and admitting that the plain meaning of the word "reciprocal is "given or owed mutually as between two persons; interchanged,"'*' BellSouth then proceeds to ignore the words *"mutually as between two persons"* in the "plain meaning" of "reciprocal."

BellSouth then relies on the lack of a specific balanced traffic requirement in the statute,[122] and the provision in 252(d)(2)(B)(i) allowing "arrangements that afford the mutual recovery of costs *through the offsetting of reciprocal obligations*, including arrangements that waive mutual recovery (such as bill-and-keep)" as support for the idea that any intercarrier compensation mechanism is permissible, as long as it provides for the recovery of costs, even from third parties. It assumes that because bill and keep arrangements *that afford the mutual recovery of costs through the offsetting of reciprocal obligations* are permissible, *any* bill and keep arrangement is permissible. Finally, BellSouth argues that the "offset" described in this provision is the same as a right of setoff.[123]

BellSouth provides no support for the proposition it must establish – that "reciprocal compensation" and "mutual and reciprocal recovery of costs" need not be either mutual or reciprocal. BellSouth simply concludes, somehow, that the mutual and reciprocal recovery of costs can be made, not through an offset or setoff of carriers' obligations between each other, but by an offset of charges to third-party end users. An offset of reciprocal obligations is an offset of obligations owed between two parties, not an offset of amounts owed to those parties by others. And the sanction of (or, more precisely, the statement that the statute does not *preclude)* bill and keep arrangements that afford the mutual recovery of costs is not a sanction of bill and keep arrangements that do not, nor is it a mandate

[121] BellSouth Comments at 22, citing Black's Law Dictionary 1269 (6th ed. 1990).

[122] BellSouth Comments at 23.

[123] BellSouth Comments at 23-25.

for these arrangements.

SBC appears to simply take the position that a "bill and keep structure is merely a set of cost recovery rules that changes the primary source of recovery for transport and termination from carriers to end users."[124] It contends that nothing in Section 251(b)(5) expressly prohibits a system in which a carrier recovers transport and termination costs from its end users; argues that Section 252(d)(2) only requires that a carrier recover its costs, not that it be paid for them;[125] and claims that Section 252(d)(2) only refers to offsetting obligations, not *payments*.[126]

Of course, the lack of an explicit prohibition in Section 251(b)(5) is irrelevant if *payments from end **users*** are not "mutual" or "reciprocal" recovery between carriers, which they clearly are not. And the point of using the word "obligations" is to allow carriers to offset their mutual obligations and not have to make payments that could more easily be offset, so SBC's argument on this point is not useful. How SBC reasons that recovery from end users is "mutual" or "reciprocal" between carriers, or how it is permitted under Section 251(b)(5) or Section 252(d)(2), remains a mystery.

Interestingly enough, SBC appears to argue that it is not allowed to recover its costs from end users, because states have not cooperated, and that the Commission is obligated to force states to do so.[127] Thus, it follows, SBC admits that the bill and keep regime it favors violates ***the Act*** if the Commission does not mandate that state commissions allow ILECs to recover costs from end users – something it has not done, even in the area of reciprocal compensation for ISP-bound calls.

Sprint essentially makes the same arguments, in shorter form, as BellSouth. Those arguments

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[124] SBC Comments at 40.

[125] SBC Comments at 43-44.

[126] SBC Comments at 45.

have been dealt with above.[128] It adds a forbearance argument, but fails to deal with the prohibition in Section 271, so the argument is not helpful to the Commission.[129]

Verizon makes no legal argument on this issue.

G. Bill and Keep for Interstate Access Charges

1. The Dangers of a Piecemeal Approach

Taylor agrees with commenters who conclude that the Commission is not, in fact, considering a unified system of intercarrier compensation, because it does not anticipate implementing major changes to access charges at this phase of the proceeding.[130] Taylor agrees with the majority of those commenters who note that the Commission is considering piecemeal changes that systematically favor incumbent LECs – that is, the payments ILECs make to other carriers are immediately transitioned to bill and keep, while the payments made by other carriers to ILECs are retained indefinitely. Despite the comments of ILECs to the contrary, the lack of competitive neutrality in the Commission's proposals in the *NPRM* could not be more glaring that it is here. And the support of ILECs for delay and lengthy transition **periods** in this area[131] is not surprising, given the competitive advantage it would confer on them.

The Commission devotes surprisingly little attention to this issue, even though access charges are the intercarrier compensation charges that *most* exceed costs, and the Commission's stated goal is

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[127] SBC Comments at 46-48.

[128] Comments of Sprint Corporation at 19-20 ("Sprint Comments").

[129] Sprint Comments at 21-22.

[130] AT&T Comments at 47-48; Illinois Comments at 2; Worldcom Comments at **9-13.**

[131] SBC Comments at 22-23; Sprint Comments at 22-23, 27-28; Comments of Verizon at 17-21 ("Verizon Comments").

efficiency. Indeed, the subject causes some concern. Both states[132] and carrier associations urge the Commission to complete a much more thorough investigation of bill and keep proposals before implementing them.[133] Some flatly oppose bill and keep for interstate access.[134]

Taylor agrees with commenters who note that Dr. DeGraba, author of the COBAK study, has demonstrated the adverse economic and competitive effects of implementing COBAK on a piecemeal basis.[135]

2. Other Problems

Taylor agrees with commenters who note that bill and keep will foster a broad new array of monopoly abuses by ILECs, by giving ILECs much more control over the end-to-end quality of long distance calls, since it will deprive IXCs of control over access arrangements.[136] ILECs will have an incentive to use this control to disadvantage IXCs as they enter the competitive long distance market.

Taylor agrees with commenters who conclude, contrary to the Commission's supposition, that bill and keep will not eliminate ILECs' ability to execute price squeezes, especially in cases where the ILEC offers long distance services.[137]

Assuming that the premises of the Commission's proposals are correct, and a bill and keep regime is more efficient than a CPNP regime for reciprocal compensation, it logically follows that it *must* be more efficient as well for all access charges, interstate and intrastate. If this is the case, it must

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[132] Comments of the Iowa Utilities Board at 3 (Iowa Comments").

[133] Comments of the Alaska Telephone Association at 2-3 ("ATA Comments").

[134] California Comments at *6-7.*

[135] Worldcom Comments at 10; Patrick DeGraba, ***Implementing Bill and Keep Carrier Compensation When Incumbent LECs Have Market Power,*** Attachment ***to*** Worldcom Comments (Aug. 20,2001) ("***DeGraba 2001").***

[136] AT&T Comments at 31-32, 48-49; Worldcom Comments at 7.

[137] AT&T Comments at 50-51.

also be the case that it is just as important to switch to bill and keep for access charges, and that the switch should occur immediately, at the same time as bill and keep for reciprocal compensation.[138] The Commission, inexplicably, does not seem to be willing to do so.

III. REFORMING THE EXISTENT CPNP REGIME

A. Can CPNP Be Efficient?

The Commission asks for comments on whether CPNP regimes can be efficient. Taylor agrees with commenters who urge the Commission to continue to drive access charges toward forward-looking economic costs.[139]

1. Rate Level Issues

The Commission asks whether it and states should adopt a forward-looking cost methodology for both access charges and reciprocal compensation if it does not adopt a bill and keep regime, and whether TELRIC costs should be the basis for those rates.[140] Taylor agrees with commenters who conclude that the Commission should adopt a forward-looking cost methodology for both access and reciprocal compensation and encourage states to cooperate,[141] and that the rates should be TELRIC-based.[142]

The Commission asks for comment on whether it should retain its existing rule that the ILEC tandem interconnection rate should serve as a presumptive proxy for competitive LECs who serve a

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[138] Ad Hoc Comments at 8-9.

[139] AT&T Comments at 51-53.

[140] *NPRM* at ¶ 99-100.

[141] Worldcom Comments at 28.

[142] Illinois Comments at 11; Worldcom Comments at 28.

comparable geographic area.[143] Taylor applauds the Commission's clear confirmation that only a geographic area, not a functional test is required,[144] and agrees with commenters who argue that the rule should be retained, is efficient, provides an incentive for better network design, and that competitive neutrality precludes any other approach.[145] Taylor also agrees with commenters who note that the ILEC argument that CLECs have lower costs implicitly concedes that ILEC architecture is not efficient and should not be the basis for properly set intercarrier rates, or rates for access to network elements.[146]

2. Rate Structure Issues

The Commission asks for comments on rate structure issues.[147] Taylor generally agrees with commenters who find that the current rate structures are working, and that there is no need to modify them, The Commission notes that states, when given the opportunity to structure reciprocal compensation rates, have generally adopted per-minute rates.[148] This should be a signal to the Commission that this structure has much to recommend it.

3. Single Point of Interconnection (and Transport) Issues

a. The Current Rules

The Commission notes that currently "an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnection at a

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143 *NPRM* at ¶ **106.**

144 *NPRM* at ¶ 105.

145 AT&T Comments at **63-65;** AT&T Wireless Comments at 54-55.

146 AT&T Comments at **64.**

147 *NPRM* at ¶ 109-111.

148 *NPRM* at ¶ 109.

single POI per LATA."[149] The Commission's existing rules preclude an ILEC for charging non-CMRS carriers for transport of traffic other than "interstate or intrastate exchange access, information access, or exchange services for such access" that originates on the ILEC's network.[150] They also require that an ILEC compensate the other carrier for transport and termination for such traffic that originates on its network facilities.[151] The Commission asks for comment on whether it should retain the single POI rule and whether it should amend its existing rules requiring the ILEC to bear its own transport costs up to the POI in the event that a CLEC picks a POI outside of the ILEC's "local calling area."[152]

The existing rules flow directly from the text of the Act. Section 251(c)(2) mandates that ILECs are required to provide for interconnection with their networks "at any technically feasible point."[153] This requirement applies regardless of the locations of ILECs' arbitrarily determined "local calling areas." Section 251(b)(5) requires an ILEC to "establish reciprocal compensation requirements for the transport and termination of telecommunications,"[154] and Section 252(d)(2)(A)(i) and (ii) require, respectively, that this compensation must provide for the "mutual and reciprocal recovery by each

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[149] *NPRM* at ¶¶ 72, 112; 47 C.F.R. § 51.701.

[150] 47 C.F.R. § 51.701(b). The *NPRM* quotes the old rule, which was amended by the ISP *Remand Order* at ¶¶ 34, 36, 39, 42-43.

[151] *Id.*

[152] Id. at ¶¶ 72, 112-114. The request is phrased in terms of whether the ILEC should bear its costs, but it is clear, despite the Commission's new tentative approach to this issue, *that the Commission's current rules require this.* ***See*** **47** C.F.R. § 51.305(a)(2); **47** C.F.R. § 51.703(b); 47 C.F.R. § 51.709(b*); Intercarrier Compensation* ***for*** *ISP-Bound Traffic,* CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-132, ¶ 78, n. 149 (Rel. April **27, 2001)(petition** for stay pending) ("*ISP Remand Order"*); In the Matter of Application by SBC Communications, *et al* to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, *Memorandum Opinion and* ***Order,*** FCC 00-238 at ¶ **78** (Rel. June **30,** 2000); In the Matters of TSR Wireless, LLC, *et al.*, v. U S West Communications, Inc., *et al.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, *Memorandum Opinion And* ***Order,*** FCC 00-194, ¶¶ 25, 31 (Rel. June 21, 2000). **As the** Commission explains in these decisions, a carrier can designate a single point of interconnection in a LATA, and each carrier is responsible for the underlying cost of the facilities on its side of the interconnection point and the cost of delivering calls to the networks of interconnecting carriers.

[153] **47** U.S.C. § 251(c)(2) (emphasis added).

[154] 47 U.S.C. § 251(b)(5).

carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier"[155] and that this compensation must be a "reasonable approximation of the additional costs of *terminating* such calls."[156] Taylor agrees with commenters who conclude that the Act clearly precludes the ILECs' position that the single POI rule should be changed or that they should receive greater compensation (i.e., more than the terminating carrier's additional costs of terminating) – that is, reimbursement for costs they incur to deliver calls that they *originate* to a distant POI.[157] Taylor agrees that the Act also precludes the Commission from adopting the ILEC POI and compensation schemes.[158]

Taylor further agrees with commenters who conclude that the existing rules are efficient and prevent ILECs from exploiting their economies of scale to preclude competitive entry,[159] and with commenters who note that the efficiency of the existing POI rule is independent of the choice between CPNP and bill and keep.[160]

Taylor also agrees with the conclusion of Dr. DeGraba, the author of the COBAK study, that a "*general reconsideration of these rules and obligations ... could hinder the development of competition and harm consumers*."[161]

Other commenters note that the small "local calling areas" of ILECs are an anachronism, neither

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[155] 47 U.S.C. § 252(d)(2)(A)(i).

[156] 47 U.S.C. § 252(d)(2)(A)(ii) (emphasis added).

[157] Allegiance Comments at 26-27, 29; AT&T Comments at *55-56*.

[158] Allegiance also makes the observation that the Commission has not sought comment on *the* correct issues in the NPRM, and thus may not consider imposing an interconnection requirement on CLECs. Allegiance Comments at 27.

[159] AT&T Comments at *56-58*.

[160] AT&T Comments at *58;* Worldcom Comments at 21-22.

[161] *DeGraba* 2001 at 27 (Emphasis added).

required nor appropriate in the contemporary telecommunications market,[162] and a distinction routinely avoided by ILECs with their use of FX and other calling plans.[163] Taylor agrees with those comments.

Most important from a competitive point of view, requiring CLECs to have POIs within each ILEC "local calling area" is not competitively neutral. Taylor agrees with commenters who note this lack of competitive neutrality, inasmuch as the ILEC proposal would require CLECs to construct imitation ILEC networks, negatively impacting their more advanced networks, and foreclose the ability of CLECs to compete on the merits of their network architectures and service offerings.[164]

Taylor also agrees with commenters who conclude that the Commission should continue to require ILECs to provide transport between the POI and the called party's end office at TELRIC-based rates.[165]

Neither the COBAK nor the BASICS proposal will resolve POI issues. COBAK contains a default rule that each carrier is obligated to carry its traffic to the central office of the terminating carrier, and assumes that the desire of both parties to avoid the default rule will lead to negotiation of the most efficient point of interconnection. Setting aside the definitional difficulties (What is a "central office"?), this scheme simply will not work. The reality is that the default rule will allow LECs to engage in a wide range of anti-competitive practices that would effectively foreclose facilities-based entry, and they would have no incentive to depart from the default rule.[166] The COBAK study concedes that where traffic is out of balance, the carrier terminating most of the traffic has no incentive to

[162] Focal Comments at 17.

[163] Focal Comments at 17-18.

[164] AT&T Comments at 59-60; Focal Comments at 18; Global Crossing Comments at 4-7; Worldcom Comments at 22.

[165] Illinois Comments at 8-10; Worldcom Comments at **23.**

[166] AT&T Comments at 34.

negotiate.[167] Thus, the default rule will become mandatory.[168] Taylor agrees with commenters who follow this reasoning.

The BASICS proposal is similarly unworkable. It proposes that carriers should, as a general rule, "divide equally the costs that result purely from interconnection."[169] "Intra-network costs" (the costs of handling all of the possible traffic their subscribers could generate) would be recovered by carriers from end-users. "Additional" costs that "result purely from interconnection" would be split equally between carriers through a non-usage-sensitive charge. The difficulty is that the BASICS study proposes no mechanism to allow a distinction between the two costs. Taylor agrees with commenters who note that this plan is unworkable.'''

b. The Sprint Proposal

Sprint proposes a rule for the allocation of transport costs to resolve the POI issue."' As Taylor understands it, Sprint's rule is as follows:

(1) a CLEC or CMRS carrier must establish one POI in each LATA in which it wishes to exchange traffic;

(2) the ILEC pays for transport to the POI if the POI is located within the local calling area of the originating end office (or MTA for CMRS carriers);

(3) if a call originates outside local calling are where the POI is located, the ILEC pays for transport to the POI, except that the CLEC (or CMRS carrier) pays for transport where *all* of the following conditions apply:

(a) the POI is not located in the originating local calling area;
(b) the traffic involved amounts to more than a **DS3 (8.9** million MOU/month); *and*

[167] *DeGraba* 2000 at ¶ 74.

[168] AT&T Comments at 34-35.

[169] *NPRM* at ¶ 25.

[170] AT&T Comments at 35-36; Worldcom Comments at 26-27.

[171] Sprint Comments at 28-33.

(c) the POI and originating end office are more than 20 miles apart.

The Sprint transport proposal is more balanced than other ILEC proposals, is more efficient, and is more competitively neutral. While Taylor prefers the current rules, it believes that the Sprint proposal would be more acceptable than other ILEC interconnection proposals.

4. Virtual Central Office Codes

The Commission also seeks comment on ILEC requests to limit the use of "virtual" central office codes ("virtual NXXs").[172]

ILEC claims regarding virtual NXXs range from the rather hysterical claim that the use of virtual NXXs is "fraudulent" and "theft of service"[173] to "reclassifying what is functionally equivalent to a long distance call as a local call."[174] These concerns are, in the view of many commenters, overstated,[175] and the characterizations of ILECs are inapposite. The fact, as commenters note, is that both ILECs and CLECs offer customers the ability to obtain a local telephone number in a "distant" calling area, ILECs offer many services that fill this need, including FX, and the use of Virtual NXXs is simply a CLEC competitive response to products traditionally offered by ILECs.[176] Taylor agrees with these commenters.

It is also a fact that virtual NXX arrangements impose no more costs on ILECs that originate traffic to such numbers than those imposed where the terminating location is in the *same* "local calling

[172] *NPRM* at ¶ 115.

[173] Verizon Comments at 4-5.

[174] SBC Comments at 17.

[175] Allegiance Comments at 52-53; AT&T Comments at 60-62; AT&T Wireless Comments at 57; Comments of Cablevision Lightpath, Inc. at 6-8; CompTel Comments at 25-29; Focal Comments at 56-59; Sprint Comments at 35-37.

[176] Allegiance Comments at 54-56; AT&T Comments at 61.

area" as the NXX code.[177] In either case, as commenters note, the ILEC is responsible for delivering traffic to the same POI.[178] Where the POI is at a tandem (as is usually the case), the cost of transport "all but disappears."[179]

The real thrust of the ILEC comments on this matter is that this is a ***revenue*** issue, not a cost issue. ILECs simply want to recover lost toll[180] (or their own FX) revenues,'*' despite the fact that none of the costs usually associated with toll services exist in this instance,[182] and despite the fact that it is doubtful that these calls would be made if they were toll calls. These are competitive losses, not costs, and as commenters note, it is not the Commission's job to make ILECs whole for competitive losses.[183]

ILEC proposals here are not competitively neutral, and would deprive CLECs of the ability to take advantage of the flexibility inherent in their network architecture.[184]

B. Can CPNP Regimes Resolve Existing Interconnection Issues?

The Commission asks for comment on whether CPNP regimes can resolve the existing

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[177] ***Focal Communications Corporation of Illinois Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois,*** Docket 00-0027, Arbitration Decision (Illinois Commerce Commission, May 8,2000) at 17-18. ***See also Petition of Coast to Coast Telecommunications, Inc. for Arbitration of Interconnection, Rates, Terms, Conditions, and Related Arrangements with Michigan Bell Telephone Company, d/b/a Ameritech Michigan,*** Case No. U-12382, Order Adopting Arbitrated Agreement at 9 (Michigan Public Service Commission, Aug. 17,2000); Allegiance Comments at 57-59.

[178] Allied Comments at 18; AT&T Comments at 61, n. 42.

[179] ***Level 3 Communications, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois,*** Docket 00-0332, Arbitration Decision (June 30,2000) at 30.

[180] Allegiance Comments at 60; AT&T Comments at 60.

[181] **It is,** of course, unlikely that there would be any toll revenues at **all,** did **Virtual** NXX **services** not **exist,** since they would in all likelihood be replaced by the ILECs **FX** services, rather than by toll. ***See*** AT&T Wireless Comments at 57.

[182] Allegiance Comments at **60.**

[183] Allegiance Comments at 59-60.

[184] AT&T Comments at 61-62.

interconnection issues and whether they will be administratively feasible.[185] **As** noted above, Taylor agrees with commenters who conclude that properly priced CPNP regimes can not only resolve existing interconnection issues, but can do it in a more efficient manner than bill and keep regimes. Taylor also agrees with commenters who note that CPNP rules are already addressing the real problems more effectively than can bill and keep rules, and that they are less administratively burdensome than bill and keep rules would be.

IV. OTHER ISSUES

A. Legal Authority

The Commission asks for comment on whether the Commission has legal authority to adopt any modification to the existing intercarrier rules proposed by a commenter.[186] For the most part, Taylor's response to comments on this matter has been addressed below. To the extent that Taylor and other commenters propose adjustments to pricing under the current CPNP regime, Taylor agrees with those commenters that the legal basis for the Commission's current rules is sufficient for such adjustments.

B. Jurisdictional Responsibility

The Commission asks for comment on how proposed reforms would affect the relationship between the Commission and the states.[187]

Several states are concerned that the Commission intends to preempt their authority and force on them a bill and keep system.[188] The difficulty, of course, is that if the Commission does not do

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[185] *NPRM* at ¶¶ 116-120.

[186] *NPRM* at ¶ 121.

[187] *NPRM* at ¶ 122.

[188] Alaska Comments at 6-9; Iowa Comments at 5.

something of this kind, it will have created an even more fractured system than now exists, one which will be more susceptible to abuse. **As** noted below and elsewhere, any bill and keep system will involve massive difficulties in coordination with the states, and the impact on separations should be considered by the Separations Joint Board prior to any Commission action.

C. Impact on End User Prices and Universal Service

The Commission asks for comment on the impact of bill and keep on universal service and end user rates.[189]

Bill and keep will entail radical changes in end user long distance pricing. Today, consumers generally pay a single price for long distance. Under bill and keep, consumers would have to add up the charges from three carriers (the originating LEC, the **IXC,** and the terminating LEC) to tell what they are paying for long distance calls, Since access charges vary considerably from LEC to LEC, total prices will vary from customer to customer and from call to call.[190]

Some state commissions say flatly that their universal service funds are incapable of absorbing rate increases resulting from bill and keep.[191] ILECs are similarly alarmed.[192]

Most states[193] and many other carriers and carrier associations[194] are insistent that bill and keep should not be implemented absent consideration **of** the matter by the Universal Service Joint Board and the Separations Joint Board.

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[189] *NPRM* at ¶¶ 123-124.

[190] AT&T Comments at 33, 50.

[191] Alaska Comments at 2-3.

[192] SBC Comments at 11-12.

[193] Alaska Comments at 3-5; Florida Comments at 3-4.

[194] ATA Comments at 2-3.

Carrier associations say shift in costs to end users would be prohibitive.[195] Sprint admits that end user rate increases are likely to be perceived as significant,[196] and estimates that replacing switched access charges with a bill and keep regime would increase end user rates $4-$5 per access line for Tier 1 LECs, and significantly higher for rate-of-return LECs.[197] The State of Alaska estimates end-user rate increases in the $30-$119 per month range.[198] California estimates $20 per line per year.[199]

V. CONCLUSION

The Commission's bill and keep proposals are of questionable legality (at best), anti-competitive, inefficient, and administratively unworkable. They fail to address any of the problems the Commission posits as reasons for their adoption, and those problems can more adequately be address in the present CPNP regime. The Commission should abandon its bill and keep proposals and concentrate instead on ensuring that the pricing under the current CPNP regime continues to be drive toward more cost-based pricing.

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[195] **ATA** Comments at 4; Comments of the ICORE Companies at **6-8.**

[196] **Sprint** Comments at ***22.***

[197] **Sprint** Comments at **24.**

[198] Alaska Comments at ***2.***

[199] California Comments at 6-7.

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